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NO. 82-1976

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1982

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STATE OF ALABAMA,

Petitioner,

vs.

JOYCE GLASS McCRARY,

Respondent

* * * * * * * * * * * * * * * * *

PETITION FOR A WRIT OF
CERTIORARI TO THE SUPREME COURT AND
COURT OF CRIMINAL APPEALS OF ALABAMA

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BRIEF FOR THE RESPONDENT IN OPPOSITION

* * * * * * * * * * * * * * * * *

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ATTORNEYS FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does a party who is convicted under a criminal statute have standing to raise the unconstitutionality of the statute?

2. Is a statute which lacks a specific intent provision and does not adequately describe the conduct sought to be restrained unconstitutionally vague?

PARTIES

In the Circuit Court of Jackson County, Alabama, the Court of Criminal Appeals of Alabama and the Supreme Court of Alabama, the parties were: The State of Alabama, who is the Petitioner herein and Joyce McCrary, who is Respondent herein.

The matters at issue here were first raised in the Circuit Court of Jackson County, Alabama and have been at issue throughout these proceedings.

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OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Alabama is reported as follows:

McCrary v. State, 429 So.2d 1121 (Ala.Cr.App. 1982)

The order of the Supreme Court of Alabama is reported as follows:

Ex parte: State; In re: McCrary v. State, 429 So.2d 1121 (Ala.Cr.App. 1982)

JURISDICTION

The Petitioner has invoked this Honorable Court's jurisdiction under 28 United States Code, Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Court of Criminal Appeals of Alabama found the statute under which the Respondent was convicted to be repugnant to the Fourteenth Amendment to the Constitution of the United States.

STATUTORY PROVISIONS INVOLVED

At issue in this case is the constitutionality of Title 20, Section 20-2-70(b), Code of Alabama, 1975. A copy of this statute has been submitted in Petitioner's Appendix "C".

STATEMENT OF THE CASE AND FACTS

I

After being convicted in the Circuit Court of Jackson County, Alabama, for possession of a counterfeit controlled substance, the Respondent appealed to the Alabama Court of Criminal Appeals.

On August 24, 1982, the Honorable Court of Criminal Appeals of Alabama reversed the Respondent's conviction on the grounds that the statute under which she was convicted is unconstitutionally vague. The State filed an application for rehearing which was overruled on October 12, 1982.

The State filed a Petition for Writ of Certiorari with the Supreme Court of Alabama, and the State Supreme Court granted the writ. However, on April 8, 1983, the Alabama Supreme Court quashed the writ "as improvidently granted" and issued no opinion.

II

The Petition is based on the following facts, as found by the Court of Criminal Appeals of Alabama:

> "The State's evidence proved that two Scottsboro police officers, armed with a search warrant, went to appellant's residence, showed her the warrant, and told her they were authorized to search for Quaaludes or methaqualone. Upon reading the warrant, appellant replied, 'All that's here are those old fake pills,' and "That's those old pills I have in the back room,' or words to that effect. The appellant then brought out a bottle containing 415 white pills stamped "LEMMON 714" and scored on the back.
>
> "One of the officers familiar

with the appearance of Quaaludes testified that the pills looked exactly like those containing the controlled substance to him. A preliminary analysis of the pills at Scottsboro police headquarters, however, indicated they did not contain the controlled substance methaqualone. The toxicologist's analysis, and later testimony, confirmed the finding that the capsules did not contain methaqualone or any other controlled substances, but compounds resembling aspirin and antihistamine.

"An official of the Lemmon Corporation testified that his company manufactured a drug containing methaqulaone, under the

trade name 'Quaalude.' The pill is stamped 'LEMMON 714' and scored on the reverse side. He testified that the pills found at appellant's residence were not manufactured by his company although they were 'a very good imitation.' He also stated that Lemmon had not authorized anyone to make a facsimile Quaalude. . . ."

McCrary v. State, 429 So.2d 1121, 1122.

SUMMARY OF THE ARGUMENT

In response to the arguments put forth by the Petitioner in his brief to this Honorable Court, the Respondent would argue as follows:

1. The Respondent has standing to challenge the constitutionality of the statute in question by virtue of the fact that she was convicted of a criminal offense under said statute and she has a vested interest in the outcome of this pending action.

2. The statute was properly declared unconstitutional by the Alabama Court of Criminal Appeals on the ground of vagueness. The statute did not properly define a specific criminal act and is "so vague as to make criminal an innocent act." Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840, 852 (1948). The statute lacks the necessary specific intent that is necessary to give the act the required degree of specificity

needed for giving adequate warning of criminal conduct.

ARGUMENT

I

The Petitioner initially contends to this Honorable Court that the Respondent, Joyce Glass McCrary, does not have standing to question the constitutionality of the criminal statute under which she was convicted and sentenced to ten years imprisonment.

It is unclear from the Petitioner's brief exactly what theory they are proposing to substantiate their claim of insufficient standing. Petitioner refers repeatedly to hypothetical cases that are being applied to "others", but Respondent fails to see how this is applicable to her case. The trial and subsequent conviction of the Respondent was certainly not hypothetical and should this Court reverse the decision of the Alabama

Court of Criminal Appeals, the ten year custodial sentence will not be served by "others", but by the Respondent, Joyce McCrary. Ms. McCrary did not raise the vagueness issue as to others, but founded her contentions on the premise that §20-2-70(b) of the Code of Alabama 1975, is unconstitutionally vague as applied to her. The statute was not specific and clear to the extent that she knew she was violating the law.

The cases relied on by the Petitioner were, for the most part, misconstrued and apparently in some instances taken out of context.

The opinion of the Alabama Court of Criminal Appeals (Pet.App. 1) cites two Alabama Supreme Court cases in support of their decision which the Petitioner claims are contrary to this Court's "policy on standing to raise the alleged vagueness of a statute." (Pet.20) The cases so cited are Kahalley v. State, 254 Ala. 482, 48 So.2d 794 (1950) and Esco v. State, 278 Ala. 641, 179 So.2d

766 (1965).

The Kahalley case deals with a conviction for unlawful peeping. The Alabama Supreme Court held that the statute Kahalley was convicted of having violated was unconstitutional under the Fourteenth Amendment to the United States Constitution in that it was vague and uncertain.

Esco, supra, concerns a statute that made it a crime to change or alter a name "with the intent to defraud or with the intent to avoid payment of any debt, or to conceal his or her identity." 179 So.2d 766, 767. Esco was indicted for changing or altering his name to conceal his identity. The Alabama Supreme Court found that it was vague and indefinite, an unconstitutional act under the Fourteenth Amendment to the United States Constitution.

Petitioner is alleging that these cases are in conflict with cases of this Court because they "tested statutes for vagueness against '. . . hypothetical cases which may never arise. . .'".

(Pet. 18-19) Such an allegation is unfounded. Kahalley and Esco were both predicated upon actual criminal occurrences. In each case a person had been tried and convicted under the statutes in question and in each the conduct was described. (Kahalley was convicted of unlawful peeping and Esco for changing his name to coneal his identity.) The Petitioner has apparently confused examples given by the court in each case as to how the given statutes could conceivably be misapplied with "hypothetical cases." The decisions in these cases were not made on hypothetical facts. The Petitioner is in error.

In attempting to support their hypothesis the Petitioner cites a more recent Alabama Supreme Court case, Blood Brothers Inc. v. Alabama Alcoholic Beverage Control Board, 386 So.2d 220 (S.Ct. Ala. 1980), and several United States Supreme Court cases. Each can be distinguished from Kahalley and Esco, and the case at bar.

In Blood Brothers, supra, the Alabama Supreme Court reversed a decision of the Alabama Court of Civil Appeals wherein a regulation of the Alabama Alcoholic Beverage Control Board Rules and Regulations was declared unconstitutionally vague. The petitioner's liquor license had been revoked when it was determined that topless dancers had performed in the club. The Alabama Supreme Court stated that the Court of Civil Appeals had premised its decision on cases dealing with standing in a First Amendment light and since the First Amendment rights were not involved in this situation then the reliance was incorrect. The Court ruled that the statute was not unconstitutionally vague as to the petitioner, that the petitioner did not have standing, and since the case did not involve First Amendment rights the petitioner could not raise the issue on behalf of third parties. The Court also noted that the United States Supreme Court had previously held that under the Twenty-

First Amendment the states have the power to control intoxicating liquors.

In Young v. American Mini Theatres, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976), the case dealt with an action for injunctive relief and a declaratory judgment against the city of Detroit, alleging that two city ordinances be declared unconstitutional. One ordinance dealt with requiring adult theaters to be licensed and the other concerned zoning of adult theaters. The United States Court of Appeals for the Sixth Circuit held that the ordinances were violative of the equal protection clause in that they "imposed a prior restraint on constitutionally protected communication." The respondents in that case also raised the vagueness question. The Petitioner cites the Young case, apparently to bolster their argument that "The long standing policy of this Honorable Court is against examining allegations of vagueness against 'hypothetical cases which

may never arise. . .' ." (Pet. 24) However, a close study of Young will reveal that the respondents in that case acknowledged that "there is no uncertainty about the impact of the ordinances on their own rights." 49 L.Ed.2d 310, 319. The issue of vagueness in Young was not applicable to the respondents. This Court went on to say that in areas of First Amendment violations a respondent could, under certain conditions, "assert the rights of third parties", but the Young case did not fall into any such category. The ordinances involved were capable of narrow construction by the court and therefore this Court would not consider hypothetical cases of "persons not before the court."

The third case relied on heavily by the Petitioner is New York v. Ferber, __U.S.__, 73 L.Ed.2d 1113, 102 S.Ct. __ (1982). Here again, the Petitioner is ostensibly claiming that the Respondent is challenging the unconstitutionality of the statute in that it is vague as applied to others. Citing

Ferber as support is not persuasive. Ferber deals with a violation of a law prohibiting the promotion of child pornography. The New York Court of Appeals held the statute to be unconstitutional as a violation of the First Amendment in that it was overbroad and underinclusive. This Court held that the conduct proscribed in the statute did not have the protection of the First Amendment. The quotation from Ferber (Pet. 25) is taken out of context. The Ferber court was dealing with construction of the overbreadth doctrine. Furthermore, in the instant case the Respondent has not challenged the statute "on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court. . ." 73 L.Ed2d 1113, 1129. What is even more interesting is that this Honorable Court never said that Ferber did not have standing to challenge the constitutionality of the criminal statute he was convicted under, as the Petitioner would have us believe.

It is ludicrous for the Petitioner to submit to this Court that an individual who is convicted of a specific criminal offense does not have standing to challenge the constitutionality of the said law. The Petitioner is asking this Honorable Court to completely disregard the inherent rights of every citizen. Who should raise the constitutionality of a law if not the person whose liberties are violated? The basic textbook principle of standing is that the party involved has a vested interest in the outcome of the action. Flast v. Cohen, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). In the case before this Court the only person who has an interest in the outcome is the Respondent. The Petitioner's allegations that the Respondent does not have standing is erroneous.

II

The Petitioner's second assertion is that the Alabama Court of Criminal Appeals improperly held that the statute in question is void for vagueness. The statute under consideration is set out in Petitioner's Appendix "C" p. 37-38. The Respondent was specifically convicted for having in her possession pills containing aspirin and antihistamine (non-controlled substances) which resembled Quaaludes, a controlled substance.

The alleged violated provision of the statute, §20-2-70(b), Code of Alabama 1975, reads as follows:

> (b) Any person who violates this section with respect to a counterfeit substance enumerated in schedules I through V is guilty of a felony and, upon conviction, for the first offense may be imprisoned

for not less than two nor more than 15 years and may be fined not more than $25,000.000.

Section §20-2-2(6) defines the term counterfeit substance in the following manner:

> Substances which, or the container or labeling of which, without authorization, bears the trademark, trade name or other identifying mark, imprint, number or device or any likeness thereof of a manufacturer, distributor or dispenser other than the person who in fact manufactured, distributed or dispensed the substance.

The Respondent was convicted for being in possession of the counterfeit pills.

The Alabama Court of Criminal Appeals determined that the statute in question

> "is unconstitutionally vague for its failure to specify either the

'intent' of the possessor or the 'purpose' of the mismarked substance which will be deemed criminal."

McCary v. State, 429 So.2d 1121, 1126.

In United States v. Harriss, 347 U.S. 612, 98 L.Ed 989, 74 S.Ct. 808 (1954), this Court stated the following accepted principle:

"The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

The statute in question could not possibly have given Respondent notice that her possession of harmless pills containing over-the-counter medication was a criminal offense.

In its decision the Alabama Court of Criminal Appeals noted that the Uniform Alabama Controlled Substance Act, of which the questionable statute is a part, was adopted by our legislature to "be in conformity" with the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970. The appellate court held that since the Alabama legislature did not include in the state act the specific intent provisions contained in the Federal act then the act is to be construed from the view that it lacks specific intent. By not stating with certainty what provisions the Act prohibits, the court was correct in declaring it void for vagueness.

In reading the sections dealing with controlled substances it is apparent that the language leaves

the statutes open to various constructions which were surely not the intent of the legislature and also raises further questions as to what conduct is covered under the act.

A literal interpretation of the Act would make it a crime for a person to have in his medicine cabinet "Bufferin" in a container labeled "Excedrin". Is a "counterfeit substance" a counterfeit of a controlled substance which is itself a controlled substance or is it a counterfeit of a controlled substance which is a compound of non-controlled ingredients? Is it a violation of this statute for two different aspirin tablets to resemble each other, or is the application strictly limited to controlled substances listed elsewhere in the Act? Is a plain white tablet which coincidently looks like another plain white tablet that containes a controlled substance subject to this statute?

Many actions are innocent until the element of specific intent is injected which in effect re-programs the actions to become something of a criminal nature.

> "Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."

Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed 840, 852 (1948).

The reasoning in Winters has been carried forward in subsequent cases.

In New York v. Ferber, supra,

> "As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant."

73 L.Ed.2d 1113, 1127

Ferber, deals with child pornography laws and held that the laws had to list the acts for-

bidden with "sufficient precision". The statute being considered by the Ferber court "expressly includes a scienter agreement." 73 L.Ed.2d 1113, 1128. The statute was determined not to be underinclusive.

Village of Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 71 L.Ed.2d 362, 102 S.Ct. 1186, reh. den. 71 L.Ed.2d 476, 102 S.Ct. 2023 (1982) considered the vagueness of a city ordinance requiring business to obtain a license to sell drug paraphernalia. The Court's decision was that the ordinance was not unconstitutionally vague or overbroad.

> "The Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. And the Court has recognized that a scienter requirement may mitigate a law's vague-

ness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed."

71 L.Ed.2d 362, 372.

The Hoffman Estates ordinance contained a scienter requirement.

The very recent case of Kolender v. Lawson, (__U.S.__, __L.Ed.2d __, __S.Ct.__) 51 U.S.L.Wk. 4532 (1983), concerns a California statute which required persons who "loiter or wander" the streets to have available "credible and reliable" identification when requested by a police officer. This Court reversed, holding that the statute was vague under the Fourteenth Amendment because it was not specific as to "credible and reliable" identification.

"the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definitiness that ordinary people can

understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

51 U.S.L.Wk. 4532, 4533.

It is evident from these cases that the inclusion or omission of a specific intent provision can weigh heavily in the determination of vagueness.

In applying the foregoing case law to the instant case it is readily apparent that the lack of the requisite specific intent will cause the statute to be held vague. An "ordinary" person would not be cognizant that having possession of pills which look like other drugs is a crime. As the Court of Criminal Appeals pointed out, the harm in having possession of such substances is the intentional sale or distribution of them under the false label.

Kolender, supra, and Ferber, supra, also give weight in their decisions to the construction that the state court has given a statute. The Petitioner seems to have had difficulty with the construction that our state court has placed on the statute under consideration.

In its opinion, the state court cited Walker v. State, 356 So.2d 672 (Ala. 1977) which held that although the state had authority under the police power to impose strict liability on certain public welfare offenses, the Alabama Controlled Substances Act was not included, so strict liability was not applied to that act. But, the court went on to say that in order to sustain the illegal possession of controlled substances there must be knowledge on the part of the possessor. However, the court, in its opinion on the present case stated that since the Respondent did not have possession of controlled substances as in Walker, but had possession of non-controlled substances "resembling"

a controlled substance then a higher degree of knowledge, specific intent, must be present.

However, we are still left with the question of specific intent to do what, with what? The Respondent had certain non-controlled substances in her possession, but where is the crime? Unlike a crime which is malum in se, the statutes we are dealing with are malum prohibitum and by their very nature must expressly state the conduct that has been deemed criminal by a law making body. A clear and specific offense must be set forth so that the actions of a person can be conformed to fall within the law. See Kahalley v. State, supra, and Esco v. State, supra. A statute which makes an heretofore acceptable act criminal by virtue of legislation is mandated to clearly express the intent of the authors so that all people can be put on notice as to the now illegal conduct. Such is not the case presently before this Honorable Court. Section 20-2-70(b), Code of Alabama 1975

does not set forth the standards by which the statute is to be measured to determine if there has been a violation. The statute is facially vague and should be so held.

CONCLUSION

The Respondent respectfully submits to this Honorable Court that the decisions of the Alabama Court of Criminal Appeals and the Alabama Supreme Court should be upheld.

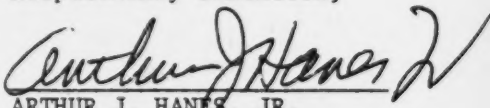
The contention of the Petitioner that the Respondent lacks standing is without merit. The cases cited by the Petitioner as being in conflict with decisions of this Court can be distinguished. There is no patently fatal conflict between the laws of Alabama and the laws of this Court. Each case must be analyzed in the light of its own distinct facts. No two cases can be alike in all respects.

The Petitioner's assertion that the statute is not vague is likewise erroneous. When a

statute cannot be interpreted by ordinary people so that the meaning of the criminal act sought to be proscribed is apparent then the act is vague.

The Respondent has been convicted under a statute that did not give her notice of the criminal act prohibited and such is a violation of her rights under the Due Process clause of the Fourteenth Amendment. For this reason the Petition for Writ of Certiorari filed by the State of Alabama should be denied.

Respectfully submitted,



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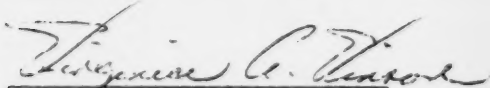

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to the Petition for Writ of Certiorari has been mailed to the attorneys for the Petitioner, first class, postage prepaid, this the 21 day of September, 1983, and addressed as follows:

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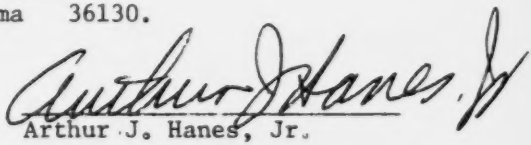

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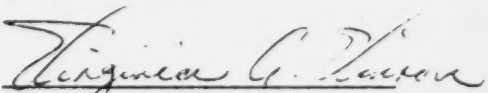

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